No. 89-645

In the Supreme Court of the United States

OCTOBER TERM, 1989

MICHAEL MILKOVICH, SR.

Petitioner,

vs.

THE LORAIN JOURNAL CO., ET AL.,

Respondents.

BRIEF OF PETITIONER

BRENT L. ENGLISH*
LAW OFFICES OF BRENT L. ENGLISH
611 Park Building
140 Public Square
Cleveland, Ohio 44114
(216) 781-9917

JOHN D. BROWN
KELLEY, MCCANN & LIVINGSTONE
300 National City East 6th Bldg.
Cleveland, Ohio 44114
(216) 241-3141

Counsel for Petitioner

*Counsel of Record

QUESTION PRESENTED

Whether statements in a newspaper article directly accusing Petitioner of lying under oath are assertions of fact subjecting the publishers thereof to potential liability for defamation or whether they are expressions of opinion immunized by the First Amendment to the United States Constitution?

PARTIES TO THE PROCEEDINGS

Petitioner is Michael Milkovich, Sr. the former Maple Heights, Ohio High School varsity wrestling coach. Respondents are J. Theodore Diadiun, a newspaper reporter for *The News-Herald*, a newspaper of general circulation in Northeastern Ohio, *The News-Herald* itself and The Lorain Journal Co., the owner of *The News-Herald*.

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The Journal Entry of the Court of Common Pleas, Lake County, Ohio, granting the motion of Defendants ("Respondents") for a directed verdict at the close of Plaintiff's ("Petitioner's") case, is unreported and is set forth in the Joint Appendix at p. 21. The Judgment Entry and Opinion of the Court of Appeals of Ohio, Eleventh Appellate District, reversing the determination of the Court of Common Pleas, are set forth in the Joint Appendix at pp. 23-27; the Opinion is reported at 65 Ohio App. 2d 143, 416 N.E.2d 662 (Lake Co. 1979). The Orders of the Supreme Court of Ohio dismissing Respondents' appeal, overruling their Motion to Certify the Record, and for Rehearing are unreported and are set forth in the Joint Appendix at pp. 38, 39, and 40. This Court's denial of Respondents' first Petition for a Writ of Certiorari is set forth in the Joint Appendix at p. 41 and is reported at 449 U.S. 966 (1980).

The Journal Entry and Opinion of the Court of Common Pleas, Lake County, Ohio granting Respondents' Motion for Summary Judgment are unreported and are set forth in the Joint Appendix at pp. 47-60. The Judgment Entry and Opinion of the Court of Appeals of Ohio, Eleventh Appellate District, Lake County, Ohio affirming the determination of the Court of Common Pleas of Lake County, are unreported and are set forth in the Joint Appendix at pp. 62-71. The Judgment Entry and Mandate of the Supreme Court of Ohio and the Opinion of that Court, reversing and remanding the decision of the Court of Appeals is set forth in the Joint Appendix at pp. 73-91, and are reported at 15 Ohio St. 3d 292, 473 N.E.2d 1191 (1984). This Court's denial of Respondent's second Petition for a Writ of Certiorari is set forth in the Joint Appendix at pp. 93-106 and is reported at 474 U.S. 953 (1985).

The Journal Entry of the Court of Common Pleas, Lake County, Ohio granting Respondents' renewed Motion for Summary Judgment is unreported and is set forth in the Joint Appendix at p. 107. The Journal Entry and Opinion of the Court of Appeals, Eleventh Appellate District, Lake County, Ohio affirming the determination of the Court of Common Pleas are unreported and are set forth in the Joint

Appendix at pp. 108-118. The Journal Entry of the Supreme Court of Ohio dismissing Petitioner's appeal and refusing to certify the record is unreported and is set forth in the Joint Appendix at p. 119.

JURISDICTION

1. On June 7, 1989, the Supreme Court of Ohio overruled Petitioner's motion for an order directing the Court of Appeals for Lake County, Ohio to certify its record and denied Petitioner's appeal as of right. This constitutes the final order of the Supreme Court of Ohio with respect to this case.

2. Jurisdiction is conferred on this Court by 28 U.S.C.A. §1257(3) (1989).

CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides in part:

> "Congress shall make no law ... abridging the freedom of speech, or of the press ..."

The Fourteenth Amendment to the United States Constitution provides, in part:

> "No State shall ... deprive any person of life, liberty or property, without due process of law."

STATEMENT OF THE CASE

A. The Facts[1]

1. This is an extraordinary libel case. It arises from an article written by J. Theodore Diadiun and published by *The News- Herald*, a newspaper in Lake County, Ohio owned by the Lorain Journal Company, all Respondents herein. Petitioner is Michael Milkovich, Sr., the former varsity wrestling coach of the Maple Heights, Ohio High School wrestling team. On January 8, 1975, Respondents published an article[2] accusing Petitioner of lying under oath in a judicial proceeding and otherwise lying in a probe of an altercation at a wrestling match.

2. The judicial proceeding at which Petitioner was accused of committing the crime of perjury was initiated by several student wrestlers on the Maple Heights, Ohio varsity wrestling team. [R.81ff.]. They alleged that a decision of the Ohio High School Athletic Association (OHSAA), an organization that governs high school athletics in Ohio, [R.97], disqualifying them from participating in the 1975 Ohio State Wrestling Tournament violated their rights to due process of law. [R.85-86; 89]. The Maple Heights team had been disqualified from that tournament by OHSAA due to a fracas that occurred at an interscholastic meet on February 9, 1974 between the Maple Heights and Mentor, Ohio teams. [R.89]. Petitioner, as coach of the Maple Heights team, was censured and put on "probation" for two years by OHSAA. [R.99-101].

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[1] All citations herein are either to testimony given at the trial conducted by the Court of Common Pleas of Lake County, Ohio starting on April 10, 1978 or to deposition testimony of Dr. Harold Meyer. Docket Entry 43 dated November 27, 1978 is the trial testimony (4 volumes) and any citations thereto are to the page numbers in those volumes, e.g. "R.___". The deposition testimony of Dr. Harold Meyer is Docket Entry 26 dated December 22, 1976 and is cited herein as "Depo. ___." Wherever these materials have been duplicated in the Joint Appendix, the citation to page numbers of the Joint Appendix is also provided, e.g. "1A. ___".

[2] The article is reproduced in full as an appendix to this Brief. It is also reproduced in the Joint Appendix at 16-17.

3. Respondent Diadiun was at the wrestling match as a reporter. Mentor, Ohio is a community in Lake County, Ohio, the primary market for *The News-Herald*. Mr. Diadiun voluntarily spoke before the OHSAA, claiming that Petitioner caused and orchestrated the fracas. [R.43; J.A. 168; Depo. 11].

4. The judge to whom the due process case was assigned held a hearing on November 8, 1974 on a motion for a temporary restraining order. Petitioner was not a party in that case but was called to testify, as was H. Don Scott, the Superintendent of the Maple Heights School District. Neither Diadiun nor anyone else from *The News-Herald* was present at the hearing. [R.50; J.A. 171-172]. Diadiun explained that the due process hearing "wasn't news for my people." [R.50; J.A. 171-172].

5. Dr. Harold Meyer, Commissioner of the OHSAA, was present for a part of the hearing but left before Mr. Scott testified. [Depo. 23-26].

6. On January 7, 1975, the Court of Common Pleas of Franklin County, Ohio issued a Temporary Restraining Order and the OHSAA was enjoined from carrying out its sanctions. [R.90-91].

7. The next day, an article written by Diadiun appeared on pages 35 and 39 of *The News-Herald* entitled "**Maple Beats the Law with the 'Big Lie'.**"[3] *Inter alia*, Diadiun alleged that Messrs. Milkovich and Scott had "lied to get themselves out of a jam" and had "lied at the [court] hearing after having given their solemn oath to tell the truth."

8. Diadiun claims to have talked with Dr. Meyer about the proceedings before the Franklin County Court of Common Pleas shortly after they took place [R.50; J.A. 171-172]. He claims that Dr. Meyer told him that "...[s]ome of the stories that they (unspecified) told the Judge sounded pretty darned unfamiliar." [R. 51; J.A. 172-173]. Diadiun did not read a transcript of the testimony prior to writing the article [R. 51; J.A. 172-173]. Diadiun learned of the

[3] The headline on page 39 was "... **Diadiun says Maple told a lie.**"

Court's decision from the Associated Press [R. 53; 173-174] and made no attempt to read the Court's opinion before publishing the article [R.55; J.A. 175-176]. Diadiun was aware that the issues before the Court were procedural rather than "finding out who was right or wrong in the case." [R. 56; J.A. 176]. He said that Petitioner's lies referred to in the article were the "complete misrepresentation of what had actually happened to put Maple Heights in a good light in front of the Judge." [R. 57; J.A. 176-177]. Diadiun claimed that Petitioner "...lied about the way he presented himself and his version of what went on at the wrestling match to the Court." [R.64; J. A. 181].

9. Dr. Meyer testified at trial that Petitioner's testimony was "pretty much the same" as it had been before the OHSAA [R. 115]. He categorically denied telling Mr. Diadiun that Petitioner had lied before the Court [R. 115; Depo. 26]. And he denied saying anything to Diadiun about Mr. Scott since Meyer was not present when Scott testified. [Depo. 13].

B. The Proceedings

1. On April 30, 1975, Milkovich filed suit in the Court of Common Pleas of Lake County, Ohio against *The News-Herald* and The Lorain Journal Company. The complaint was later amended to name Diadiun as a defendant. [Joint Appendix at 10] The action was tried to a jury in April, 1978. After five days of trial, Respondents' motion for a directed verdict was granted on the grounds that Milkovich was a public figure[4] and that there was insufficient evidence of actual malice to warrant sending the case to the jury.

2. Milkovich appealed to the Ohio Court of Appeals for the Eleventh Appellate District, Lake County, Ohio. On December 3, 1979, that Court reversed and remanded the case, *Milkovich v. Lorain Journal Co.*, 65 Ohio App. 2d 143 (1979).

[4] The public figure question was raised by motion prior to trial as was the alleged insufficiency of proof of actual malice. The Court granted Respondents' motion as to Petitioner's alleged public figure status but denied summary judgment on the actual malice question. [Joint Appendix at 120; Docket Entry No. 30, May 23, 1977].

3. Respondents appealed to the Supreme Court of Ohio. On March 20, 1980, Ohio's highest court dismissed the appeal on the basis that no substantial constitutional question existed. This Court subsequently denied Respondents' Petition for a Writ of Certiorari. *Lorain Journal Co. v. Milkovich*, 449 U.S. 966 (1980).

4. On remand to the Court of Common Pleas of Lake County, Ohio, Respondents moved for summary judgment contending for the first time that Diadiun's defamatory statements were constitutionally protected as "opinions." The Trial Court granted summary judgment. Milkovich appealed to the same Court of Appeals which affirmed the decision on October 3, 1983. Milkovich then appealed to the Supreme Court of Ohio which, on December 31, 1984, reversed the Court of Appeals. The Supreme Court of Ohio held that Petitioner was not a public figure or a public official and that Respondents were not immune from liability because Diadiun's statements were not "opinions." *Milkovich v. Lorain Journal Co.*, 15 Ohio St. 3d 292 (1984). Respondents again petitioned this Court for a Writ of Certiorari but the Writ was denied. *Milkovich v. Lorain Journal Co.*, 474 U.S. 953 (1985).

5. On remand, the Trial Court stayed proceedings while the Supreme Court of Ohio considered the companion case of *H. Don Scott v. The News Herald*, 25 Ohio St. 2d 243 (1986). The *Scott* case arose out of the same defamatory article and was brought by the former Superintendent of Schools in Maple Heights. On August 6, 1986, a bare majority of the Supreme Court of Ohio held, 4-3, that the same statements which had been found to be factual assertions in *Milkovich* were now "opinions" entitled to absolute protection under the First Amendment. Respondents were thus immunized from liability to Mr. Scott.

6. After *Scott* was decided, Respondents again moved for summary judgment contending that the Supreme Court of Ohio's decision in *Scott* compelled it. The Court of Common Pleas of Lake County, Ohio in due course granted the motion. The Court of Appeals for the Eleventh Appellate District, Lake County, Ohio affirmed the Trial Court's decision on February 6, 1989. Petitioner again appealed to the

Supreme Court of Ohio. On June 7, 1989, that Court declined to review the decision of the Court of Appeals on the stated ground that no substantial constitutional issue was presented.

7. Petitioner filed a Petition for a Writ of Certiorari on September 5, 1989 in this Court and on January 22, 1990 the Writ was granted.

SUMMARY OF ARGUMENT

1. A broad constitutionally-based opinion privilege will not materially advance any interest protected by the First Amendment but will have a serious detrimental effect on the ability of persons to redress reputational injury caused by publication of defamatory falsehoods. Constitutional limitations on state defamation laws are justified only by where there is a substantial danger to freedom of speech or of the press. *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). False statements of fact are not protected by the Constitution. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974). Since a Plaintiff must now prove falsity without resort to presumptions in defamation cases, *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 267 (1985), there is little, if any, need for an opinion privilege.

2. The statements published by Respondents about the Petitioner are unquestionably verifiable and defamatory. This Court has recognized that rhetorical hyperbole is not actionable where it is not defamatory. *Greenbelt Cooperative Publishing Assn., Inc. v. Bresler*, 398 U.S. 6 (1970). It has also recently required plaintiffs to prove falsity. *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767 (1985). The Record shows that Respondents accused Petitioner of committing the crime of perjury. Under Ohio law, such allegations are defamatory *per se*. Moreover, in this case the truth or falsity of the allegations is easily demonstrated. And the actionable statements are plainly not rhetorical hyperbole. Thus, unless the statements are immunized by a very broad opinion "privilege," they are clearly actionable.

3. If a First Amendment-based opinion privilege is recognized by this Court, it should be construed very narrowly and be premised

on an objective analysis of the statements in issue from the perspective of an average reader. This is consistent with the common law fair comment privilege and with many decisions of courts which have considered the question. Multifactor analyses for distinguishing between opinion and fact have often ignored the plain meaning of a defamatory statement and have not had the proper focus: ie. How would a reasonable reader of the disputed statements perceive them? If the language used is not rhetorical and the statements can be empirically proved or disproved, statements are actionable unless a reasonable contextual analysis reveals otherwise. A jury should be permitted to decide the question where it is reasonably debateable.

4. Even a very broad opinion privilege cannot protect the statements in issue in this case. This is because they are plainly verifiable and the context in which they were made shows unequivocally that they were intended by the author as, and reasonably perceived by an average reader to be, assertions of fact. The decision of the Ohio Court of Appeals for the Eleventh Appellate District, premised on the Supreme Court of Ohio's decision in *Scott v. The News-Herald*, 25 Ohio St. 3d 243 (1986), is seriously in error since it ignored the plain meaning of the language used by Respondents and the fact that the accusations of illegality were clearly disprovable. The lower courts impermissibly relied on inherently subjective factors that did not overcome the objective evidence. Accordingly, the judgment should be reversed and the case should be remanded for trial.

ARGUMENT

I.

THIS COURT HAS NEVER RECOGNIZED THE NEED FOR OR THE VALIDITY OF A BROAD, FIRST AMENDMENT-BASED OPINION PRIVILEGE; SUCH A PRIVILEGE WOULD UNJUSTIFIABLY PROTECT DEFAMERS WITHOUT ANY CORRESPONDING SOCIETAL BENEFIT.

The defamatory statements about Mike Milkovich published in the *News-Herald* on January 8, 1975 are not privileged under the First Amendment. Factual assertions are not entitled to First Amendment protection. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974). The statements plainly accused Petitioner of the crime of perjury. Those statements cannot tenably be transmuted into constitutionally-protected expressions of "opinion." To do so would distort the delicate balance between the Constitution's guarantees of press and speech and the legitimate need to redress reputational injury caused by publication of defamatory falsehoods.

New York Times Co. v. Sullivan, 376 U.S. 254, 277 (1964) established that the First Amendment, incorporated by the Fourteenth, validly imposes Constitutional limits on a State's common law of defamation. The *raison d'etre* of such limits is the need to preserve and protect "uninhibited, robust and wide-open" debate on public issues. 376 U.S. at 270. Liability for defamation was perceived as imposing sufficient financial burdens on the press as to induce media self-censorship. *Id.* at 277-279. To offset such impacts, this Court adopted the actual malice standard for public officials.[5] *New York Times Co. v. Sullivan, supra.* This standard "administers an extremely

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[5]This Court held, notwithstanding Alabama's common law of libel, that a federal rule, premised on the First Amendment, was necessary in defamation cases involving "public officials," ie. public officials could not recover for defamatory falsehoods published about them unless they could demonstrate that such were published with "actual malice, — ie. with knowledge that they were false or with reckless disregard of whether they were false or not." *New York Times Co. v. Sullivan,*

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powerful antidote to the inducement of media self-censorship [caused by] the common-law rule of strict liability for libel and slander." *Gertz, supra*, at 342. However, "...it extracts a correspondingly high price from the victims of defamatory falsehood." *Ibid.*

The class of victims of defamatory falsehoods forced to pay the "high price" imposed by the New York Times rule has already been expanded to its justifiable maximum. In *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967), the rule was extended to "public figures".[6,7] In

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376 U.S. at 279-280. Justices Black, Douglas, and Goldberg averred that the Constitution permitted and indeed required a federal rule precluding any recovery whatsoever by public officials for defamation related to their official conduct. *New York Times Co. v. Sullivan*, 376 U.S. at 292-305. However, Justice Goldberg noted presciently that "purely private defamation has little to do with the political ends of self-governing society. The imposition of liability for private defamation does not abridge the freedoms of public speech or any other freedom protected by the First Amendment." *Id.* at 301-302.

[6]The Supreme Court of Ohio has determined in this case that Petitioner is a private individual for defamation purposes. *Milkovich v. News-Herald*, 15 Ohio St. 3d 292 (1984). Respondents attempted to have this Court review that decision in 1985, but this Court declined to do so. 474 U.S. 953 (1985). Dissenting, Justices Brennan and Marshall expressed the belief that the Supreme Court of Ohio had not properly applied this Court's precedents in reaching its conclusions. *Ibid.* The issue is not before the Court as the decision below was premised exclusively on the conclusion that the article in question was absolutely privileged by the First Amendment. The record shows that while Mike Milkovich, Sr. had a remarkably successful career as a wrestling coach [See Joint Appendix at 193-249; 280-281], he did not qualify as a public figure under *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974) as he neither "possessed general fame and notoriety nor did he thrust himself into the vortex of a particular public issue or engage the public's attention in an attempt to influence its outcome." *Id.* at 352. In fact, he never personally challenged the decision of the OHSAA censuring him and merely testified at the due process hearing on November 8, 1974 as a witness [Joint Appendix at 234ff]. He was defamed by the Respondents, who had no idea what he testified to before the Court, the day after the Court made its ruling public, not for what he did *qua* coach but for what he purportedly did on the witness stand when called to testify in a case brought by others.

[7]The sole question presented for review by Petitioner was "[w]hether statements in a newspaper article directly accusing Petitioner of lying under oath are assertions of fact subjecting the publisher thereof to potential liability for defamation or whether they are expressions of opinion immunized by the First Amendment to the United

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Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767 (1985), this Court imposed an additional burden on defamation plaintiffs to prove falsity. Adoption of a broad opinion privilege could literally destroy the common law of defamation if statements laden with factual content and plainly intended and perceived as assertions of fact are given absolute immunity under the First Amendment. Petitioner implores this Court not to adopt such a privilege or, at least, to narrowly construe it consistent with its precedents and a rational assessment of the competing interests at stake.

In considering whether to adopt an opinion privilege in this case, as well as the perimeters and mechanics of it, it is well to note Justice Stewart's concurring opinion in *Rosenblatt v. Baer*, 383 U.S. 75, 92-94 (1966):

> It is a fallacy...to assume that the First Amendment is the only guidepost in the area of state defamation laws. It is not. As the Court says, 'important social values...underlie the law of defamation. Society has a pervasive and strong interest in preventing and redressing attacks upon reputation.'
>
> The right of a man to the protection of his own reputation from unjustified invasion and wrongful hurt reflects no more than our basic concept of the essential dignity and worth of every human being — a concept at the root of any decent system of ordered liberty. The protection of private personality, like the protection of life itself, is left primarily to the individual States under the Ninth and Tenth Amendments. But this does not mean that the right is entitled to any less recognition by this Court as a basic of our constitutional system.
>
> We use misleading euphemisms when we speak of the

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States Constitution." Sup. Ct. R. 14 provides that "...[t]he statement of any question presented will be deemed to comprise every subsidiary question fairly included therein. *Only* the questions set forth in the petition or fairly included therein, will be considered by the Court." (Emphasis added).

New York Times rule as involving 'unihibited, robust, and wide-open' debate, or 'vehement, caustic, and sometimes unpleasantly sharp' criticism. What the New York Times rule ultimately protects is defamatory falsehood. No matter how gross the untruth, the New York Times rule deprives a defamed public official of any hope for legal redress without proof that the lie was a knowing one, or uttered in reckless disregard of the truth.

That rule should not be applied except where a State's law of defamation has been unconstitutionally converted into a law of seditious libel. The First and Fourteenth Amendments have not stripped private citizens of all means of redress for injuries inflicted upon them by careless liars. The destruction that defamatory falsehood can bring is, to be sure, often beyond the capacity of the law to redeem. Yet, imperfect though it is, an action for damages is the only hope for vindication or redress the law gives to a man whose reputation has been falsely dishonored.

> Moreover, the preventive effect of liability for defamation serves an important public purpose. For the rights and values of private personality far transcend mere personal interests. Surely if the 1950's taught us anything, they taught us that the poisonous atmosphere of the easy lie can infect and degrade a whole society.

In *Gertz v. Robert Welch, Inc.* 418 U.S. at 347-348, this Court, weighing the competing interests at stake, declined to provide blanket First Amendment protection to any defamatory falsehood concerning "matters of general or public interest." This was in contradistinction to *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29 (1971), where a plurality of this Court took the New York Times privilege

> ...one step further. [Justice Brennan, writing for the plurality]...concluded that its protection should extend to defamatory falsehoods relating to private persons if the statements concerned matters of general or public interest. [The

> rationale was] ...society's interest in learning about certain issues: 'If a matter is a subject of public or general interest, it cannot suddenly become less so merely because a private individual is involved, or in some sense the private individual did not 'voluntarily' choose to become involved.'

Gertz v. Robert Welch, Inc., 418 U.S. 323, 337 (1974), *quoting Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 43 (1979).[8] The Court held that the States were free to "define for themselves the appropriate standard of liability for a publisher...of defamatory falsehood who injures a private individual...so long as they do not impose liability without fault." 418 U.S. at 347-348.

While *Gertz* should fairly be viewed as not enlarging Constitutional limits in defamation cases, a short passage from Justice Powell's introductory remarks setting the stage for the Court's holding has given rise to the proposition that *Gertz* recognizes a First Amendment-based "opinion" privilege. Since then, some courts have expanded this presumed privilege to the point where clearly actionable assertions of fact have been transmuted into opinions despite the language used and the plain meaning of the statements in context.[9] This case is a quintessential example of such misguided efforts and reveals why there is such a compelling need for reasoned guidance by this Court.

The genesis of the presumed constitutional "opinion" privilege is generally recognized as the following passage from *Gertz:*

> We begin with the common ground. Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correc-

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[8] In *Gertz*, this Court said that "[t]he extension of the New York Times test proposed by the Rosenbloom plurality would abridge this legitimate state interest [in protecting reputation] to a degree that we find unacceptable. And it would occasion the additional difficulty of forcing state and federal judges to decide on an *ad hoc* basis which publications address 'general or public interest' and which do not — to determine, in [Justice Marshall's words], 'what information is relevant to self-government.'" (Citation omitted), 418 U.S. at 337.

[9] A compilation of cases is in Comment, *Statements of Fact, Statements of Opinion, and the First Amendment*, 74 Calif. L. Rev. 1001, 1009 at N. 52.

> tion not on the conscience of judges and juries but on the competition of other ideas. But there is no constitutional value in false statements of fact. Neither the intentional lie nor the careless error materially advances society's interest in 'uninhibited, robust, and wide-open debate' on public issues…They belong to a category of utterances which 'are no essential part of any expositions of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.' (Internal citation omitted).

418 U.S. 339-340. Not only was the opinion-fact distinction not before the Court in *Gertz*, the context in which the quoted passage was written shows that it was plainly intended as a description of basic philosophical principles and not as an exposition of a potentially broad constitutional "opinion" privilege, further federalizing[10] state defamation law. Chief Justice Rhenquist has observed that the *Gertz* passage was just

> an exposition of the classical views of Thomas Jefferson and Oliver Wendell Holmes that there was no such thing as a 'false idea' in the political sense, and that the test of truth for political ideas is indeed the marketplace and not the courtroom. I continue to believe this is the correct meaning of the quoted passage. *But it is apparent…that lower courts have seized upon the word 'opinion' in the second sentence to solve with a meat axe a very subtle and difficult question, totally 'oblivious of the rich and complex history of the struggle of the common law to deal with this problem.'* (Internal citation omitted) (Emphasis supplied).

Ollman v. Evans, 471 U.S. 1127 (1985) (dissenting on denial of certiorari).

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[10]That this is so, is evident from the holding of the case which is that "so long as [states] do not impose liability without fault, [they] may define for themselves the appropriate standard of liability…[for those who publish injurious defamatory falsehood], *Gertz v. Robert Welch, Inc.*, 418 U.S. at 347.

The "meat axe" approach was adopted by the courts below in this case. As a result, Respondents were immunized from responsibility for their unprivileged conduct and Petitioner's serious reputational injury has gone uncompensated. As set forth below, there was no justification for this result.

II.

THE STATEMENTS OF FACT PUBLISHED BY THE RESPONDENTS ARE ACTIONABLE BECAUSE THEY ARE DEFAMATORY AND CAN BE PROVED FALSE.

The American law of defamation has long recognized a distinction between publication of "opinion" and "fact": "The distinction is a necessary and important one [because] truth [is an affirmative] defense for one who publishe[s] defamation…[T]he ascertainment of what is truth [as to] an opinion poses a quite different question from that which is presented when…a statement of fact is published…about another." W. Keeton, *Prosser and Keeton on the Law of Torts*, §113(A) at 813 (5th ed. 1984). The common law privilege of fair comment protects publishers of defamatory statements regarded as "opinions" provided they relate to matters of public interest. The privilege does not apply to "misstatements of fact." W. Keeton, *supra*, at §115; *See, generally*, Veeder, *Freedom of Public Discussion*, 23 Harv. L. Rev. 413, 414-415 (1910); Hill, *Defamation and Privacy Under the First Amendment*, 76 Colum. L. Rev. 1205, 1277 *et seq.* (1976). With nuances from state to state, the fair comment privilege protects statements (i) about matters of public concern (ii) based on statements of fact (iii) which represent the actual opinion of the author and (iv) are not made solely to cause harm to the one criticized. Franklin & Bussell, *The Plaintiff's Burden in Defamation: Awareness and Falsity*, 25 Wm. & Mary L. Rev. 825, 854-855 (1984); Comment, *Statements of Fact, Statements of Opinion, and the First Amendment*, 74 Calif. L. Rev. 1001, 1002-03 (1986). Essentially the privilege evolved to protect publishers of opinions who, by virtue of being unable to "prove" the truth of them, were unfairly exposed to defamation claims. *Ibid.*

While it has always been necessary to prove that a statement is both false and defamatory to be actionable, a presumption has been recognized in some states that by virtue of being defamatory a statement is also false, unless the Defendant proves otherwise. *Restatement of Torts (Second)* §613, Comment J.[11]

This Court's 5-4 decision in *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767 (1985) altered the common law rule and imposed an affirmative duty of proving falsity on a private defamation plaintiff suing a media defendant for speech of public concern. *Id.* at 776-777.[12,13] As it now stands, therefore, a defamatory statement incapable of being empirically proved or disproved is not actionable, whether or not it is characterized as "opinion," if it is made by a media defendant and is of "public concern." *Ibid.*[14]

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[11]Ohio appears to require proof of falsity without reliance on a presumption. Cf. Ohio Rev. Code §2739.02 creating a *statutory affirmative* (absolute) *defense* of truth and cases such as *Hersch v. The E. W. Scripps Co., et al.*, 3 Ohio App. 3d 367 (Cuy. Co. 1981) (erroneously citing *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340-341 (1974) for the proposition).

It is settled under Ohio law that to be actionable as defamation, a statement must be defamatory, ie. it subjects a person to public hatred, contempt, ridicule, shame or disgrace or affects him injuriously in his trade, business, or profession. *Cleveland Leader Printing Co. v. Nethersole*, 84 Ohio St. 118 (1911). A statement is defamatory *per se* if the language used obviously casts the plaintiff into opprobrium and it is *per quod* when the statement is itself innocent but by virtue of interpretation or context it is defamatory. *Becker v. Toulmin*, 165 Ohio St. 549 (1956).

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[12]Justices Stevens, Burger, White and Rhenquist dissented, expressing the view that the majority reached a "pernicious result." *Id.* at 781. The dissent pointed out in strong terms that the decision unjustifiably "insulated deliberate, malicious character assassination" by means of statements that can be "neither verified nor disproved." *Id.* at 785.

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[13]A public figure or public official plaintiff must likewise prove falsity to prevail. *Garrison v. Louisiana*, 379 U.S. 64, 74 (1964); *Herbert v. Lando*, 441 U.S. 153 (1979); *But see*, dissent of Justice Stevens in *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 788 at N. 10.

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[14]The majority's opinion noted that "[w]e recognize that requiring the Plaintiff to show falsity will insulate some speech that is false, but unprovably so." *Philadelphia Newspapers, Inc.*, 475 U.S. at 788.

In several instances, this Court has held that statements which are "rhetorical hyperbole" are not defamatory[15] and are thus not actionable. In *Greenbelt Cooperative Publishing Assn., Inc. v. Brester*, 398 U.S. 6 (1970), a statement that a land developer's negotiating position was "blackmail" was held not defamatory because "...even the most careless reader must have perceived that the word was no more than rhetorical hyperbole, a vigorous epithet by those who considered [the developer's public and wholly legal negotiating position] extremely unreasonable." *Id.* at 14. In *Old Dominion Branch No. 496, National Assn. of Letter Carriers, AFL-CIO v. Austin*, 418 U.S. 264 (1974), this Court held that the epithet "scab" was not actionable in the context of a labor dispute as it was not regarded as a *falsehood* (it was "literally and factually true" *Id.* at 283) and it was protected under Section 7 of the National Labor Relations Act as amended, 61 Stat. 136, 29 U.S.C. A. §§141 *et seq.* (1989). (Emphasis added) *See, Linn v. Plant Guard Workers*, 383 U.S. 53 (1966).[16]

Therefore, the first and foremost consideration as to whether a statement is actionable (irrespective of whether it is considered an "opinion") is whether it can be verified. If the language used is rhetorical hyperbole, but does not subject the person to opprobrium, it is not actionable because it is not defamatory. *Greenbelt Cooperative Publishing Assn., Inc. v. Brester*, 398 U.S. 6 (1970). If the language is rhetorical but is defamatory (ie. it subjects a person to hatred, ridicule, or disgrace or injures him in his business, trade or profession), it is still not actionable, as a matter of law, if it cannot be proved false, and was made by a media defendant on a matter of "public concern." *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767 (1985). However, if the language is defamatory and may be proved false it is plainly actionable.

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[15]The American Law Institute defines a defamatory statement as one which "...tends to so harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him." *Restatement of Torts (Second)*, §559 (1977).

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[16]The Court expressly declined to consider any First Amendment arguments, presumably based on the contention that the epithet was "opinion," since the National Labor Relations Act protects such speech. *Letter Carriers, supra*, at 283, N. 15.

A clear example of the distinction is seen in *Buckley v. Littell*, 539 F.2d 882 (2d Cir. 1976) wherein the United States Court of Appeals for the Second Circuit evaluated two statements — one alleging that columnist/author William F. Buckley was a "fellow fascist traveler" and another accusing him of lying about and libeling others. The Second Circuit held that the statement "fellow fascist traveler" and similar words were rhetorical and had "loose" and "variable" meanings making them unsusceptible to proof of truth or falsity. Thus, they were not actionable. *Id.* at 894. However, the assertions that Mr. Buckley lied about and libeled others were both "constitutionally and tortiously" defamatory since they were definite and could be proved false. *Id.* at 895-896; *See, too, Hotchner v. Castillo-Puche*, 551 F.2d 910, 913 (6th Cir. 1977) ("an assertion that cannot be proved false cannot be held libellous.")

In the case at bar, it cannot seriously be disputed that the Respondents accused Petitioner of lying under oath:

> *If you get in a jam, lie your way out.* If you're successful enough, powerful enough, and can sound sincere enough, you stand an excellent chance of making the *lie* stand up, regardless of what really happened.
>
> * * * * *
>
> [Milkovich] came to the hearing and *misrepresented* the things that happened.
>
> * * * * *
>
> *Anyone who attended the meet knows in his heart that Milkovich...lied at the hearing after...having given his solemn oath to tell the truth.* But [he] got away with it... (Emphasis supplied).

Perjury is a serious crime under Ohio law, R.C. §2925.11.[17]

[17]That section reads as follows:

(A) No person, in any official proceeding, shall knowingly make a false statement under oath or affirmation, or knowingly swear or affirm the truth of a false statement previously made, when either statement is material.

(Footnote continued on next page)

Accusing a person of a crime is defamatory *per se* under Ohio law. *State v. Smily*, 37 Ohio St. 30 (1881); *Post Publ. Co. v. Moloney*, 50 Ohio St. 71 (1893); *See, also, Annot.* 1 A.L.R. 3d 844 (1965); *Annot.* 53 A.L.R. 2d 8 (1957).

There is likewise no doubt in this case that Petitioner can prove that the allegations of perjury are not true. The hearing before the Court of Common Pleas of Franklin County, Ohio at which Petitioner purportedly committed the crime, were recorded by a court reporter using stenography. The Petitioner's statements at the prior OHSAA "hearings" were both recorded and witnessed by many persons. Thus, if Petitioner materially altered or "polished and reconstructed" his "story" between the time of the OHSAA "hearings" and the court hearing, such will be readily evident. Likewise, if Petitioner's "story" was not materially altered as Respondents falsely contended, then the same evidence will demonstrate this clearly and convincingly.

The statements in issue in this case are thus both defamatory and may be proved false. Unless they can somehow be construed as constitutionally protected "opinion," they are plainly actionable.

(Continued from previous page)

(B) A falsification is material, regardless of its admissibility in evidence, if it can affect the course or outcome of the proceeding. It is no defense to a charge under this section that the offender mistakenly believed a falsification to be immaterial.

(C) It is no defense to a charge under this section that the oath or affirmation was administered or taken in an irregular manner.

(D) Where contradictory statements relating to the same material fact are made by the offender under oath or affirmation and within the period of the statute of limitations for perjury, it is not necessary for the prosecution to prove which statement was false, but only that one or the other was false.

(E) No person shall be convicted of a violation of this section where proof of falsity rests solely upon contradiction by testimony of one person other than the defendant.

(F) Whoever violates this section is guilty of perjury, a felony of the third degree.

III.

ANY OPINION PRIVILEGE RECOGNIZED BY THIS COURT SHOULD BE DRAWN NARROWLY AND REST ON A REASONABLE CONTEXTUAL ANALYSIS CONSIDERED FROM THE PERSPECTIVE OF AN AVERAGE READER

In light of established precedent requiring a defamation plaintiff to prove falsity to recover damages, there is no justification whatever for recognizing an opinion privilege based on the First Amendment. Such a privilege would merely enlarge the number of victims who are without legal remedies for injuries caused by publication of defamatory falsehoods and create confusion and uncertainty. Uncertainty will inevitably result in an unintended but real chilling effect on the press. Clarity "...in the area of free speech [is particularly important] for precisely the reason that the actual malice standard is necessary. Uncertainty as to the scope of the constitutional protection can only dissuage protected speech — the more elusive the standard, the less protection it affords." *Harte-Hanks Communications, Inc. v. Connaughton*, ___ U.S. ___, 109 S.Ct. 2678, 2695 (1989).

If an opinion privilege is recognized by this Court, at the least it should be drawn narrowly and be based on reasonable contextual analysis. While the opinion-fact distinction can be difficult to make in some instances, the appropriate focus should always be on whether the language used has loosely defined meaning or is quite clear in context and whether the statements made are empirically provable. These indicia more often than not lead to evident conclusions: If the language used is imprecise and the statements made are not provable as true or false, it follows that they are entitled to protection, as "opinion," whether or not such protection derives from the First Amendment. However, where, as here, the language is definite, has a plain meaning, and is empirically provable, it is quite clearly not entitled to such protection.

This non-esoteric and common sense approach to the distinction will reap substantial rewards, not the least of which will be that the press will have a relatively certain way to judge whether it is exposing itself to libel claims. Further, the seemingly inexhaustible efforts of

litigants and the judiciary to find "factors" with which to weigh the distinction can be reduced to a truly meaningful inquiry: How would an ordinary and reasonably prudent reader interpret the statements in issue?

Certain types of speech have frequently been labeled and protected as "opinion" even before constitutional limits to recovery in defamation actions were recognized in *New York Times Co. v. Sullivan, supra.* The fair comment privilege was, by and large, restricted to "expression of opinion." *Mashburn v. Collins*, 355 So.2d 879, 885 (La. 1977). The benchmark for determining if that privilege applied was an assessment of how an ordinary reader would regard the statement at issue. *Id.* With the advent of a "constitutional" and purportedly absolute privilege to express "opinions" with impunity, a number of courts have adopted essentially the same formulation. Thus, where statements are, by themselves or in context, quite apparently rhetorical hyperbole, they have been protected notwithstanding their factual content.[18] Where, as here, assertions of fact are made in the context of commentary, it is necessary to perform a reasonable contextual analysis to determine what the meaning of the statements would be to an average reader.

If the plain meaning of the offending statements in context is that they were intended and reasonably would be perceived as assertions of fact, and where those assertions are verifiable or refutable, there is no

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[18] *See*, for example, *Myers v. Boston Magazine Co.*, 380 Mass 336, 403 N.E. 2d 376 (1980) (claim that Plaintiff was the "worst" sportscaster in Boston and not "knowledgeable" "articulate" or "serious" about sports in the context of "rough humor," "one-liners" and preposterous propositions [eg. the Boston Bruins were said to be the worst "sexy athletes" as "you'd look like a gargoyle, too, if you spent a lifetime fielding hockey pucks with your face"] held to be rhetorical hyperbole and opinion as a matter of law; *Pring v. Penthouse Int'l.*, 695 F.2d 438 (10th Cir. 1982) ("a gross, unpleasant, crude, distorted attempt to ridicule the Miss America contest and its contestants [without] any redeeming value [was held protected as opinion because it was] simply impossible...[for] an average reader to not have understood that the charged portions were pure fantasy and nothing else." *Id.* at 434); *Mashburn v. Collins*, 355 So.2d 879, 888 (La. 1977) (review of restaurant's cuisine referring to two dishes as "trout a'la green plague" and "yellow death on duck" held privileged as "opinion").

justification for any conclusion other than the statements are not privileged as opinions. An important and as yet unresolved question is whether, assuming there is a constitutional opinion privilege, a jury may be called on to resolve the question if it is fairly debateable — ie. whether the statement could reasonably be construed by an objective reader to be either opinion or fact.[19] Petitioner suggests there is no valid reason for excluding a jury from this task and indeed several courts have so held. *See, Good Gov't Group v. Superior Court*, 22 Cal. 3d 672 (1978), *cert. denied sub nom, Good Gov't Group v. Hogard*, 441 U.S. 961 (1979); *Myers v. Boston Magazine Co.*, 380 Mass. 386, 403 N.E. 2d 376 (1980).[20] There are obvious ways to protect against erroneous interpretation, e.g. summary judgment in obvious cases such as those described in footnote 18, above, proper jury instructions, and various post-verdict procedures including a new trial and / or judgment *non obstante veredicto* (JNOV). *See, generally,* Halpern, *Of Libel, Language, and Law: New York Times v. Sullivan at Twenty-Five*, 69 No. Car. L. Rev. 274, 300-311 (1990) (arguing for rule: "If the audience response is central, the jury is in the best position to discern that response." *Id.* at 310).

This framework for resolving the opinion-fact distinction would have substantial benefits for all involved. Publishers and broadcasters would have a definitive and objective standard to follow. Victims of defamatory falsehoods would not be faced with an unjustifiable constitutional limitation on their ability to recover damages in appropriate cases. And courts would not be burdened with making the opinion-fact distinction when it is fairly debateable. Instead, they could rely on the collective wisdom of the jury to make that judgment.

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[19]A jury demand was made in the case pursuant to Ohio R. Civ. Proc. 38. *See* Joint Appendix at 10.

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[20]A number of courts have held otherwise, not the least of which is the Supreme Court of Ohio in *Scott v. News-Herald*, 25 Ohio St. 3d 243, 250 (1986); *See, also, Janklow v. Newsweek, Inc.*, 788 F.2d 1300, 1305 N. 7 (8th Cir.), *cert. denied*, 479 U.S. 883 (1986); *Ollman v. Evans*, 750 F.2d 970, 978 (D.C. Cir. 1984), *cert. denied*, 471 U.S. 1127 (1985).

IV.

ANY REASONABLE ANALYSIS OF THE STATEMENTS IN ISSUE IN THIS CASE LEADS TO THE CONCLUSION THAT THEY ARE NOT PRIVILEGED.

It is mainfestly clear that a reasonable reader of the defamatory statements about the Petitioner in Respondents' article published on January 8, 1975 would not construe them as merely Mr. Diadiun's "heartfelt opinions." Instead, the only reasonable construction that could be made of these statements is that Petitioner was being openly accused of reprehensible and illegal conduct. These statements are not privileged by the First Amendment or by any recognized common law privilege.

Because of the inherent variability and ambiguity in language, a multitude of formulations have been developed for analyzing how particular language should be evaluated in light of the presumed constitutional opinion privilege.[21] The present case is illustrative of the diversity of these efforts and shows why objective standards are necessary.

On December 31, 1984, the Supreme Court of Ohio properly determined that the statements here in issue were actionable factual assertions in part because "[n]othing in the article effectively precautions the reader that the author's assertions are merely his considered opinions" and because "[t]he plain import of the author's assertions is that Milkovich...committed the crime of perjury in a court of law." *Milkovich v. The News-Herald*, 15 Ohio St. 3d 292, 299 (1984).

Less then two years later, the same court, following an election in which two justices in the *Milkovich* majority were defeated,[22] and

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[21]A good example is seen in *Ollman v. Evans*, 750 F.2d 970 (D.C. Cir. 1984) *(en banc), cert. denied*, 471 U.S. 1127 (1985) wherein every member of the court wrote on the subject, the opinions occupying 68 pages in the *Federal Reporter 2d.*

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[22]The justices of the Supreme Court of Ohio are chosen by the electorate and sit for six year terms, Ohio Const. Art. IV §6. Justice Clifford Brown in his biting dissent in *Scott* openly accused the majority of "curry[ing] favor with the media at large in an election year" by its decision. *Id.* at 275.

again on a 4-3 vote, determined that precisely the **same** defamatory statements were instead constitutionally-protected as opinion. *H. Don Scott v. The News-Herald*, 25 Ohio St. 3d 243 (1986). The *Scott* court reached this erroneous conclusion by perfunctorily acknowledging, and then totally disregarding, all objective factors showing that the statements were assertions of fact and by applying inherently subjective factors such as the "broader objective context" to reach the unwarranted conclusion that a reasonable reader would not have viewed those assertions as being "factual." This "tortuous route to a preordained result" resulted in a "vapid meaningless test" that "make[s] every statement of fact an opinion in every case." 25 Ohio St. 3d at 264; 273; 275-276 (dissenting opinions of Chief Justice Frank J. Celebreeze and Justice Clifford Brown, respectively).

The *Scott* court adopted a "totality of the circumstances" test where "at least" four factors were to be considered:

> First is the specific language used, second is whether the statement is verifiable, third is the general context of the statement and fourth is the broader context in which the statement appeared.

Id. at 250.[23]

The first two factors — the "common meaning of the article," *Id.* at 250, and "whether the statements [were] verifiable," *Id.* at 251, the only objective factors (i.e. ones which could be measured by some reasonable standard) were readily conceded by the Court to support Petitioner's view that the statements were actionable assertions of fact (*Id.* at 251-252). However, these two factors were totally disregarded in favor of quintessentially subjective factors through which, by disingenuous analysis, the Court was able to conclude that Mr. Diadiun did

[23]The Court was not specific as to what other factors might conceivably be considered in its "totality." 25 Ohio St. 3d at 250. The factors were said to be useful "only as a compass to show direction and not a map to set rigid boundaries." *Ibid.*

not actually accuse Petitioner of the crime of perjury but instead merely stated his "opinion" about the whole episode.[24]

Persuasive to the majority were these facts:

1. The headline of the article was framed by "T.D. Says" which "would indicate to even the most gullible reader that the article was, in fact, opinion." (*Id.* at 252);

2. The follow-up page was headlined "Diadiun *says* Maple told a lie" (emphasis in original) (*Ibid.*);

3. The author used "subjective language of apparency" by commenting on the role of a teacher, coach, and administrator which "revealed that the issue in context, was not the statement that there was a legal hearing and Milkovich...lied [at it]." (*Id.* at 252). The Court called a statement attributed to Dr. Harold Meyer that "...some of the stories told to the judge were pretty darned unfamiliar..." a "troubling addition" to the article. However, it minimized this by saying that the "article was really based on the two events [that Diadiun] personally witnessed." (*Id.* at 253). Since Diadiun mentioned that the hearing was a due process hearing, this was an "implicit caveat" (*Id.* at 253);

4. Diadiun was "not making an attempt to be impartial and [made] no secret of his bias." (*Ibid*);

5. The article appeared on the sports page, a "traditional haven for cajoling, invective, and hyperbole" and thus "legal conclusions in such a context would probably be construed as the writer's opinion." (*Id.* at 254).

By the foregoing application of inherently subjective factors to the total exclusion of objective and common sense factors, the Court reached a vexingly unsupportable conclusion. Indeed, mischaracter-

[24]It is especially important to note that Diadiun himself swore in an affidavit that he believed that Petitioner in fact lied under oath. *See*, Joint Appendix at 141-142. ["In my article of January 8, 1975 I reported that [Milkovich] lied in his court testimony and this I believed to be true"].

ization of these paradigm assertions of fact as mere opinions is the epitome of "Humpty Dumpty's use of language." *Cianci v. New Times Publishing Co.*, 630 F.2d 54, 64 (2d Cir. 1980).[25]

The subjective analysis applied in *Scott* and followed in lock-step fashion by the Ohio Court of Appeals for the Eleventh Appellate District,[26] shows the fallacy of formulaic and mechanistic approaches to the distinction.[27] By relying on the fact that the article is framed by "T.D. Says" and that the word "says" is in the follow-up headline (Items A & E, in footnote 27), the Court ignored that the headlines said in bold print that **"Maple beat the law with the big lie"** and **"Maple told a lie."** (Emphasis in original) "Maple," from a cursory view of the article, means the Petitioner and his co-Plaintiff, H. Don Scott.

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[25] *Cianci v. New Times Publishing Co.*, 639 F.2d 54 (1980), is a particularly well-reasoned and relevant case. There, the Court held that a jury could reasonably construe statements in a sharply written article alleging that Cianci, a former mayor of Providence, Rhode Island, was guilty of depraved conduct as assertions of fact and not as protected "opinions." *Id.* at 61-64.

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[26] The Eleventh District Court of Appeals below considered itself bound by the *Scott* decision under Ohio procedural rules recognizing intervening decisions of the Supreme Court of Ohio as an exception to the law of the case doctrine. *Milkovich v. The News-Herald*, Ohio Court of Appeals for the Eleventh Appellate District, Case No. 13-009 (unreported) (February 6, 1989) (included in the Joint Appendix at 107-117); *See*, as to the law of the case issue, *Nolan v. Nolan*, 11 Ohio St. 3d 1 (1984).

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[27] The article's defamatory statements in context are as follows:

A.

Maple beat the law with the 'big lie'

By Ted Diadiun, News-Herald Sports Writer

Yesterday in the Franklin County Common Pleas Court, judge Paul Martin overturned an Ohio High School Athletic Assn. decision to suspend the Maple Heights wrestling team from this year's state tournament.

It's not final yet — the judge granted Maple only a temporary injunction against the ruling — but unless the judge acts much more quickly that he did in this decision (he has been deliberating since a Nov. 8 hearing) the temporary injunction will allow Maple to compete in the tournament and make any further discussion meaningless.

* * * * *

(Footnote continued on next page)

Further, the focus on the purported "language of apparency" and on "implicit caveats" is a palpably obvious way of avoiding the plain

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B.

...When a person takes on a job in a school, whether it be as a teacher, coach, administrator or even maintenance worker, it is well to remember that his primary job is that of educator...[m]any are the lessons taken away from school by students which weren't learned from a lesson plan or out of a book. They come from personal experiences with and observations of their superiors and peers, from watching actions and reactions.

Such a lesson was learned (or relearned) yesterday by the student body of Maple Heights High School, and by anyone who attended the Maple-Mentor wrestling meet of last Feb. 8. A lesson which, sadly, in view of the events of the past year, is well they learned early.

It is simply this: *If you get in a jam, lie you way out.*

If you're successful enough, and powerful enough, and can sound sincere enough, you stand an excellent chance of making the lie stand up, regardless of what really happened.

The teachers responsible were mainly high school wrestling coach Mike Milkovich and former superintendent of schools H. Donald Scott...

* * * * *

C.

[W]hen Mentor protested to the governing body of high school sports [about Milkovich's alleged misconduct during a high school wrestling match], the two men [Milkovich and Don Scott, the Maple Heights School Superintendent], were called on the carpet to account for the incident. But they declined to walk into the hearing and face up to their responsibilities...Instead they chose to come to the hearing and *misrepresent the things that happened*...Fortunately...the Milkovich-Scott version had enough contradictions and *obvious untruths* so that the six board members were able to see through it. Probably as much in distasteful reaction to the *chicanery* of the two officials...the board...suspend[ed] Maple from this year's tournament and put...Milkovich...on probation. But unfortunately, by the time the hearing before Judge Martin rolled around, Milkovich and Scott apparently had their version of the incident *polished* and *reconstructed*... [T]he judge bought their *story*.

* * * * *

D.

Anyone who attended the meet...knows in his heart that Milkovich and Scott lied at the hearing after each having given his solemn oath to tell the truth. But they got away with it. Is this the kind of lesson we want our young people learning from their high school administrators and coaches? I think not.

* * * * *

E.

"Diadiun says Maple told a lie." (Emphasis supplied.)

and only reasonable meaning of the language in context. Judge Friendly noted in *Cianci, supra,* that "[i]t would be destructive of the law of libel if a writer could escape liability for accusations of crime using, explicitly or implicitly, the words, "I think." 639 F.2d 54 at 64. Respondents unquestionably accused Petitioner of committing the crime of perjury. Mr. Diadiun's commentary in the article about the implications of this factual assertion does not lessen the defamatory sting of the statement or change its character from that of an assertion of fact to a mere opinion. It serves no valid purpose to ignore or gloss over what is actionable as if it were not there and to rely on "implicit caveats" to overcome the obvious.

The fact that Respondents made no bones about their prejudice and partiality does not mean that their assertions that Milkovich lied under oath should be construed as anything less than assertions of fact. Instead, it strengthens the conclusion since Diadiun conveyed to the readership the "fact" that Petitioner lied at a judicial hearing as if he knew this absolutely: "Anyone who attended the meet...knows in his heart that Milkovich...lied at the [judicial] hearing after...having given his solemn oath to tell the truth." It could not be clearer than that Diadiun was stating this *as a fact.*

Finally, it is particularly fallacious in this case to suggest that the assertions were opinions because they were printed on the sports page, a "traditional haven for cajoling, invective and hyperbole," *Scott, supra,* at 254.[28] It need only be said that Petitioner was a highly successful wrestling coach with a well-earned reputation. His reputation was earned by his success in coaching high school wrestling, a subject not likely to be printed anywhere else than on a newspaper's sports page. To be accused on the sports page, before readers most familiar and concerned with Petitioner, of the pernicious crime of perjury was particularly devastating and injurious to his reputation.

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[28]It has never been the law in this country that placement of an article on a particular page of a paper gives a defamer absolute immunity. Moreover, Petitioner is unaware of any rule of law holding that those involved with sports are less entitled to protection of their reputational interests *per se.*

Thus, the fact that the article was placed on the sports page in no way precautioned the reader that it was opinion just as the text of the article did not.

CONCLUSION

The statements that Petitioner lied under oath were not rhetorical hyperbole, were empirically provable, and are not constitutionally-protected as "opinion" as a matter of law. The decision of the Ohio Court of Appeals for the Eleventh Appellate District to the contrary was in error and should be reversed. Petitioner respectfully requests that this Court enter such an order and remand this case for proceedings not inconsistent with its decision.

Respectfully submitted,

/s/ Brent L. English
BRENT L. ENGLISH
140 Public Square
611 Park Building
Cleveland, Ohio 44114
(216) 781-9177

Counsel of Record for Petitioner

Of counsel:
JOHN D. BROWN
Kelley, McCann & Livingstone
300 National City East 6th Building
Cleveland, Ohio 44114
(216) 241-3141

Maple beat the law with the 'big lie'

By TED DIADIUN
News-Herald Sports Writer

Yesterday in the Franklin County Common Pleas Court, judge Paul Martin overturned an Ohio High School Athletic Assn. decision to suspend the Maple Heights wrestling team from this year's state tournament.

It's not final yet — the judge granted Maple only a temporary injunction against the ruling — but unless the judge acts much more quickly than he did in this decision (he has been deliberating since a Nov. 8 hearing) the temporary injunction will allow Maple to compete in the tournament and make any further discussion meaningless.

But there is something much more important involved here than whether Maple was denied due process by the OHSAA, the basis of the temporary injunction.

TD Says

When a person takes on a job in a school, whether it be as a teacher, coach, administrator or even maintenance worker, it is well to remember that his primary job is that of educator.

There is scarcely a person concerned with school who doesn't leave his mark in some way on the young people who pass his way — many are the lessons taken away from school by students which weren't learned from a lesson plan or out of a book. They come from personal experiences with and observations of their superiors and peers, from watching actions and reactions.

Such a lesson was learned (or relearned) yesterday by the student body of Maple Heights High School, and by anyone who attended the Maple-Mentor wrestling meet of last Feb. 8.

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... Diadiun says Maple told a lie

(Continued from Page 35)

A lesson which, sadly, in view of the events of the past year, is well they learned early.

It is simply this: If you get in a jam, lie your way out.

If you're successful enough, and powerful enough, and can sound sincere enough, you stand an excellent chance of making the lie stand up, regardless of what really happened.

The teachers responsible were mainly head Maple wrestling coach Mike Milkovich and former superintendent of schools H. Donald Scott.

Last winter they were faced with a difficult situation. Milkovich's ranting from the side of the mat and egging the crowd on against the meet official and the opposing team backfired during a meet with Greater Cleveland Conference rival Metor, and resulted in first the Maple Heights team, then many of the partisan crowd attacking the Mentor squad in a brawl which sent four Mentor wrestlers to the hospital.

Naturally, when Mentor protested to the governing body of high school sports, the OHSAA, the two men were called on the carpet to account for the incident.

But they declined to walk into the hearing and face up to their responsibilities, as one would hope a coach of Milkovich's accomplishments and reputation would do, and one would certainly expect from a man with the responsible poisition of superintendant of schools.

Instead they chose to come to the hearing and misrepresent the things that happened to the OHSAA Board of Control, attempting not only to convince the board of their own innocence, but, incredibly, shift the blame of the affair to Mentor.

I was among the 2,000-plus witnesses of the meet at which the trouble broke out, and I also attended the hearing before the OHSAA, so I was in a unique position of being the only non-involved party to observe both the meet itself and the Milkovich-Scott version presented to the board.

Any resemblance between the two occurances is purely coincidental.

To anyone who was at the meet, it need only be said that the Maple coach's wild gestures during the events leading up to the brawl were passed off by the two as "shrugs," and that Milkovich claimed he was "Powerless to control the crowd" before the melee.

Fortunately, it seemed at the time, the Milkovich-Scott version of the incident presented to the board of control had enough contradictions and obvious untruths so that the six board members were able to see through it.

Probably as much in distasteful reaction to the chicanery of the two officials as in displeasure over the actual incident, the board then voted to suspend Maple from this year's tournament and to put Maple Heights, and both Milkovich and his son, Mike Jr. (the Maple Jaycee coach), on two-year probation.

But unfortunately, by the time the hearing before Judge Martin rolled around, Milkovich and Scott apparently had their version of the incident polished and reconstructed, and the judge apparently believed them.

"I can say that some of the stories told to the judge sounded pretty darned unfamiliar," said Dr. Harold Meyer, commissioner of the OHSAA, who attended the hearing. "It certainly sounded different from what they told us."

Nevertheless, the judge bought their story, and ruled in their favor.

Anyone who attended the meet, whether he be from Maple Heights, Mentor, or impartial observer, knows in his heart that Milkovich and Scott lied at the hearing after each having given his solemn oath to tell the truth.

But they got away with it.

Is that the kind of lesson we want our young people learning from their high school administrators and coaches?

I think not.